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No. 88-1339

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DOMINION FEDERAL SAVINGS & LOAN ASSOCIATION,
Cross-Petitioner,

—v.—

PENTHOUSE INTERNATIONAL, LTD., BOARDWALK PROPERTIES, INC., QUEEN CITY SAVINGS & LOAN ASSOCIATION, and MELROD, REDMAN & GARTLAN, P.C.,

Cross-Respondents.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR CROSS-RESPONDENT QUEEN CITY SAVINGS AND LOAN ASSOCIATION IN OPPOSITION TO CROSS-PETITION

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Cross-respondent Queen City Savings and Loan Association ("Queen City")[1] submits this brief in opposition to the

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1 Pursuant to Rule 28.1 of the Supreme Court Rules, cross-respondent Queen City makes the following disclosures: (1) Queen City's name was changed to First Atlantic Savings and Loan Association in January, 1986; and (2) Queen City has the following wholly-owned service corporations/subsidiaries: First Atlantic Service Corp. (NJ corp.), First Atlantic Brokerage Service, Inc. (NJ corp.), First Atlantic Financial Corporation (Del. corp.), First Atlantic Insurance Agency, Inc.

cross-petition for a writ of certiorari filed by cross-petitioner Dominion Federal Savings and Loan Association ("Dominion").

STATEMENT OF THE CASE

The District Court Proceeding

This case was commenced by cross-respondents Penthouse International, Ltd. and Boardwalk Properties, Inc. (collectively "Penthouse") in the Southern District of New York against Dominion and cross-respondent Melrod, Redman & Gartlan, P.C. ("Melrod") seeking damages against Dominion for anticipatory breach of contract, and damages against Melrod for fraud. Dominion filed a third-party complaint against Queen City, in which it asserted a claim for indemnity and claims for damages.[2] In the third-party action, Queen City counterclaimed against Dominion for damages caused by Dominion's breach.

The district court awarded Queen City nearly $7.7 million (plus interest and costs) on its counterclaim for the damages caused by Dominion's breach, on precisely the same basis that the district court held Dominion liable to Penthouse (A.91a). The district court dismissed with prejudice each of Dominion's third-party claims against Queen City (A.66a).

The Second Circuit's Decision

On the basis of its holding that Dominion was not liable to Penthouse for damages for an anticipatory breach, the court of

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(NJ corp.), First Atlantic Leasing Corporation (NJ corp.), First Atlantic at West Windsor, Inc. (NJ corp.), Queen City at Beaver Brook, Inc. (NJ corp.), Queen City at Rustlewood, Inc. (Fla. corp.), First Atlantic at Panther Valley, Inc. (NJ corp.), Queen City at Hunter's Crossing, Inc. (NJ corp.), and Cowger & Miller (Kentucky corp.).

2 As page 3 of Dominion's cross-petition indicates, Dominion dropped its third-party claims for damages on appeal. The only third-party claim considered on appeal, then, was whether Queen City's alleged "waiver" of pre-closing conditions constituted a breach of fiduciary duty rendering it liable to Dominion for indemnity.

appeals reversed the judgment entered against Dominion in favor of Queen City (A.46a). The court of appeals also affirmed the dismissal of Dominion's third-party claim for indemnity against Queen City (A.55a). In so holding, the court of appeals reasoned as follows (A.47a):

> "Dominion contends that the district court erred when it dismissed with prejudice its third-party claim against Queen City. Dominion predicated its theory of Queen City's liability on the argument that, if Queen City did in fact waive four preclosing conditions, in so doing it breached its fiduciary duties owed to Dominion and the other participants. *Because, however, we conclude that no waiver occurred*—because Queen City had no authority to waive conditions—*it follows that Queen City is not liable for any purported waiver. Accordingly, we affirm the district court's dismissal of this claim.*" (Emphasis supplied)

The Instant Proceedings

Penthouse filed a timely petition for a writ of certiorari on January 11, 1989 in No. 88-1144. Queen City—originally a third-party defendant in the district court proceeding—had determined not to pursue this matter any further, and did not file such a petition. However, on February 9, 1989, Dominion served what it characterizes as a "conditional cross-petition for certiorari", seeking reinstatement and reconsideration by the district court of its third-party indemnity claim in the event this Court grants certiorari and ultimately remands the main case to the district court. Thus, Dominion now "conditionally" seeks to reincarnate portions of the third-party action and, if successful, will thrust Queen City back into this litigation once again. Under the circumstances, it is respectfully submitted that, if Dominion's third-party claim ultimately is remanded, further review and reconsideration of the dismissal of Queen City's counterclaim asserted in the third-party action is also warranted.[3]

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3 A review of the Rules of this Court has not disclosed the specific procedure to be followed by a cross-respondent who, by reason of and in response to a "conditional" cross-petition, also seeks "conditional" relief.

In any event, Dominion's sole argument in support of its cross-petition is predicated on a single erroneous argument: that review of the dismissal of its indemnity claim is warranted because the court of appeals affirmed the district court's dismissal of the indemnity claim "solely because it had reversed the district court's finding of anticipatory breach by Dominion and the judgment in favor of Penthouse upon which the claim-over was predicated," (Cross-Petition, p. 3), citing A.47a of the appendix in support of its position.

As is discussed below, Dominion's argument is wrong and the cross-petition should be denied. As is also discussed below, in the event the cross-petition is granted and the case is ultimately remanded, it is respectfully urged that the district court be permitted to give further consideration to the counterclaim asserted by Queen City in the third-party action.

REASONS FOR DENYING THE WRIT

I

Dominion Has Stated No Reason Why Dismissal Of Its Indemnity Claim Should Be Reviewed

Dominion's cross-petition for a writ of certiorari on its third-party claim for indemnity should not be granted even if Penthouse's petition for a writ of certiorari is granted.

Dominion's sole argument in support of its cross-petition rests on the contention that "[t]he court of appeals . . . found it unnecessary to reach the merits of the third-party claim." (Cross-petition, p. 3).

Dominion's argument is wrong. The court of appeals dismissed Dominion's third-party indemnity claim on the merits, having found that the theory underlying Dominion's claim for indemnity against Queen City was without substance as a factual and legal matter.

The court of appeals held that, under the facts of this case, Queen City may not be held liable to Dominion for indemnity.

Notwithstanding Dominion's assertions to the contrary, the court of appeals' dismissal of Dominion's indemnity claim was based on its separate review of the merits of that claim and was reached without reference to or reliance on the "mootness" of the third-party claim in light of the court's reversal of Penthouse's judgment against Dominion.

Accordingly, the only reason advanced by Dominion to justify further consideration of its indemnity claim completely overlooks—indeed, directly contravenes—the decision of the court of appeals. The court of appeals flatly rejected the theory on which Dominion predicated its indemnity claim against Queen City, holding that since Queen City could not have waived pre-closing conditions, it could not be held liable to Dominion for any such purported waiver (A.47a).

Dominion has not even attempted to show why the court of appeals' dismissal of its third-party claim presents any issue worthy of this Court's review.[4] Not one "special" or "important" reason within the meaning of Rule 17 has been advanced by Dominion to justify the granting of its cross-petition.

In view of the fact that the court of appeals dismissed the third-party indemnity claim on the merits and in light of Dominion's failure to advance any cognizable ground for reinstatement and reconsideration of that claim, it is respectfully urged that the cross-petition be denied.

II

If Dominion's Cross-Petition is Granted, the Dismissal of Queen City's Counterclaim Should Be Reconsidered

The district court's decision in favor of Queen City on its counterclaim was based solely upon the court's holding that, by

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4 To the contrary, Dominion, in its Brief in Opposition to the Penthouse petition, acknowledges and reaffirms the reasons given by the court of appeals for its dismissal of the indemnity claim, stating: "there was no evidence in the record to suggest any implied grant of power to Queen City to waive the pre-closing conditions. Indeed, all the evidence was to the contrary" (Dom. Br. in Op., p.10).

reason of Dominion's anticipatory breach, Dominion was liable to Penthouse and "all parties to which it was contractually obligated" (A.91a). Likewise, the court of appeals stated in its opinion that Queen City's counterclaim was being dismissed solely because the court of appeals reversed Penthouse's judgment against Dominion (A.46a). Thus, to the extent that any claim in this case was dismissed by the court of appeals solely because of the court's disposition of a related claim, it is Queen City's counterclaim (and not Dominion's indemnity claim) which was dismissed on this basis. Dominion's cross-petition states an argument for reinstatement and reconsideration applicable to Queen City's counterclaim but not to its own third-party indemnity claim.

Under the circumstances, if the cross-petition is granted, it is respectfully urged that reconsideration of the dismissal of Queen City's counterclaim—asserted only in the third-party action—is also warranted.

Prior to Dominion's filing of a cross-petition, Queen City was merely a nominal respondent in the proceedings in this Court; the filing by Penthouse of a petition for certiorari did not involve Queen City, and Queen City—originally a third-party defendant in the district court action—would not have pursued this case any further.

However, by its cross-petition, Dominion seeks to revitalize portions of its third party complaint. In the event the cross-petition is granted (although we urge that there is no basis for doing so, even if Penthouse's petition is granted) and the case is ultimately remanded, Queen City necessarily will be thrust back into the litigation. In such event, it would be "unfair" (to use Dominion's words at page 3 of the cross-petition) to Queen City for this Court to remand the third party "claim-over" but not the counterclaim asserted by Queen City in response to the third party complaint.

CONCLUSION

For the above reasons, the cross-petition should be denied, and Queen City's counterclaim should be given further consideration in the event the cross-petition is granted.

Dated: March 6, 1989

Respectfully submitted,

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